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ABSTRACT

Personal record management practices must reflect contemporary concerns for the rights of the individual. Recent legislation, court decisions, and the rapid expansion of computerized record systems all point to the need for new procedures in personal record keeping. Although this paper is addressed particularly to educational agencies responsibile for personal records, it is hoped that the paper will contribute to better record management by all agencies in their decisions involving collection, maintenance, and release of personal data. (Author)

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FOREWORD

Personal record management practices must reflect contemporary concerns for the rights of the individual. Recent legislation, court decisions, and the rapid expansion of computerized record systems all point to the need for new procedures in personal record keeping. Although this paper is addressed particularly to educational agencies responsible for personal records, it is our hope that the paper will contribute to better record management by all agencies which maintain information about individuals. The content of this paper is designed to assist educational agencies in their decisions involving collection, maintenance, and release of personal data.

C. Taylor Whittier
Commissioner of Education

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BACKGROUND INFORMATION

The general press and professional educational literature of recent months have expressed many concerns related to the whole process of personal record[1] collection, maintenance, and dissemination. Several national organizations, such as the Russell Sage Foundation and its Conference Report on Records, have called attention to the fact that the management of personal records, particularly in schools, is in a state of turmoil. Until recently property rights have held the attention of the public, as evidenced by many laws, regulations, and litigations. During the past decade, however, increasing emphasis has been placed on rights of personal privacy.

Educational agencies need to be alerted to the growing concern of educators and to the changing attitudes of law makers and the courts regarding the area of personal record management.

For Kansas educators, four legislative acts are significant in relation to personal records. In 1973, the Kansas legislature passed K.S.A. 72-961 et seq.[2] and K.S.A. 72-9001 et seq.[3] Two other Kansas legislative acts concerning personal records are K.S.A. 45-201 et seq.[4] and K.S.A. 72-7515.[5] In 1974, the Congress passed the Family Educational Rights and Privacy Act of 1974,[6] effective November 20, 1974. The latter national act is considered landmark legislation. Because of the apparent incompatibility of K.S.A. 45-201 et seq. and the privacy act of 1974, it is not possible for the State Board of Education to issue a policy statement encouraging educational agencies to develop policies which comply with said state and federal laws.[7]

In education, it is axiomatic that adequate decisions are based on reliable information. Information must be appropriate, relevant, essential, current, and accurate. Once collected, however, adequate protection and proper use of the information present many problems. To

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[1]A personal record, as defined in this paper, is anything which is maintained about individuals in writing, on film, or on tape for others to read, see, or hear.

[2]See Appendix A.

[3]See Appendix B.

[4]See Appendix C.

[5]See Appendix D.

[6]See Appendix E.

[7]See Appendix F.

compound the concerns and the complexities of issues in personal record management, the data have become more private and subjective in nature, which necessarily makes the data more sensitive and volatile. The primary ethical problem becomes the resolving of conflict which arises from the right of privacy versus the right of other persons to know.

Because of modern technology and the expansion of services rendered by educational agencies, the responsibilities in record management have increased proportionately to the amount and types of data accumulated and managed by the educational agencies. Quality control of record management practices, however, has not kept pace with current professional and social demands.

Foundations for a Sound Policy Statement

There are three primary considerations that apply to every aspect of personal records management:

1. Ethics.

   All users of records should practice their professional organization's code of ethics through every day application. Professional ethics should be the standard of behavior in every decision of record management.

2. Due Process.

   It is now apparent that individual rights are seriously threatened if records are maintained with such secrecy that those who are involved cannot challenge the retention or accuracy of the data. Both the National Committee for Citizens in Education[8] and the Russell Sage Foundation[9] take strong positions in favor of highly structured, formally adopted rules and regulations which guarantee grievance procedures and provisions for appeal of concerned parties.

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[8]See Annotated Bibliography

[9]See Annotated Bibliography

3. Individual Informed Consent.

Individual informed consent is closely related to the ethical and the due process considerations of personal records. Where individual informed consent is required before collecting, recording, and releasing personal information, parent and student consent should be obtained when the student is legally competent to understand the nature and consequences of his decision.

DEVELOPMENT AND REVIEW OF POLICY[10]

Local and state educational agencies are responsible for ensuring that the policy and regulations on record keeping conform to laws and the decisions of the court. The professional staff of each agency should be responsible for determining the need for information about students and personnel, and the legal counsel for identifying laws and regulations which affect policy formation. Policy should be formulated and adopted through a process which acknowledges the reality and legitimacy of interests among the representatives of each group. School board members should involve teachers, principals, superintendents, students, and other interested parties in the construction of policy. Such a policy should then be binding on the actions of those who implement the policy. Protection of individual privacy in developing and reviewing policies of record management is essential in the process of promoting educational progress.

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[10]Russell Sage Foundation, Guidelines for the Collection, Maintenance, and Dissemination of Pupil Records (Sterling Forest, N.Y.: Russell Sage Foundation, 1970) was relied upon heavily for this section and the following.

The policy and regulations on record management should include the following topics:

1. Definition of records.
2. Criteria for data to be collected, maintained, and disseminated.
3. Specification of the purposes which justify collection of data about individuals.
4. Designation of persons who are authorized to collect the data.
5. Determination of the custodians of the records.
6. Classification of data into categories.
7. Determination of who has right of access to different categories of records and under what circumstances they are to be made available.
8. Delineation of grievance procedures and provisions for appeal.
9. Specific instructions concerning a) identification of persons who submit data, b) how long each kind of record should be stored, c) the security precautions to be observed, d) the time and method of editing and destroying out-dated material, and e) the procedures for permitting third party access to the records unless provided by law.

COLLECTION OF DATA

The fundamental principle for collecting personal data is that no information should be collected about any individual without prior informed consent. By nature, consent is twofold: individual or representational. Whether such consent should be obtained individually or through the individual's representatives depends on the nature of the information desired.

Individual Informed Consent

With the exception of routine data used for personal identification (name and date of birth) the gathering of information concerning

an individual or his family, such as personality test results, ethnic origin, religious belief, or income, should require individual consent and/or consent of his parent or guardian.[11] In all cases, the person's consent concerning the collection of personal information should be obtained if he is legally competent to understand the nature and consequences of his decision. The consent should be in writing and filed with the record. The consent is not valid unless the student[12] and/or parents have been informed, preferably in writing, of the following stipulations:

1. The nature of the data to be collected.
2. The methods by which the data will be collected.
3. The methods by which the data will be recorded and maintained.
4. The uses to which the data will be put.
5. The time period for which the data will be retained.
6. The persons to whom the data will be available.
7. The conditions under which the data will be available.

The principle of informed consent will apply in all cases except those involving responsibility under existing child abuse or neglect statutes.

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[11]The term "guardian" denotes the person legally responsible for the individual.

[12]Only individual consent is required if the person is 18 years of age or above.

Representational Informed Consent

It is essential to note that federal and state laws, regulations, and local policy require collection, reporting, and recording of a variety of data about individuals, thus binding all individuals, parents, and guardians, whether or not they consent individually to the collection of such data. Elected representatives of the public, such as school boards and legislatures, satisfy the principle of representational consent for such information as aptitude and achievement testing and skill and knowledge outcomes in the subject matter areas. Such circumstances establish implied consent by the representatives of the constituency and is sufficient for the collection of certain data. In such cases the student and parents should be informed in advance of the process and purpose of the data collecting to allow them sufficient time to contest the need or use for a particular data collection process.

Data collected under conditions of anonymity of the persons about whom the information is collected should be gathered only after the appropriate form of consent is obtained. A policy for regulating the collection of this type of data should be developed to include (a) timely notification to students and their parents that their participation is voluntary and (b) careful reviews of the instruments and procedures to be used in the data collection to determine whether the methods or inquiries are an invasion of privacy. If invasion of privacy might be involved, then prior informed individual consent must be obtained.

CUSTODY AND MAINTENANCE OF PERSONAL RECORDS

In school situations, as noted above, students and/or parents have the right to interpretations understandable to the recipient of the content of any personal record. They also have the right to an opportunity to challenge the contents of their school records.

It is recommended that a responsible person be assigned the task of maintaining records under adequate security at all times. All personnel having access to records should receive periodic training with emphasis upon ethical procedures and the privacy rights of students and/or parents.

There is general agreement among those studying the problems of maintaining personal records that a formal system of classification of data must be established.

It appears that personal data fall quite naturally into three groups:

Category I: Permanent data.

This category includes the minimum personal data necessary for operation of the educational system. This would include identifying data, such as name, address, birth date, and perhaps the educational history of the individual. In schools, these data should also include attendance records, grades, and standardized achievement test scores.

Category II: Verified data.[13]

Verified data are of two types: (a) data needed to assist the individual as he works toward his goals, and (b) data that are needed to protect others, e.g., information about communicable disease. Included in these types are health data and family background information that has a direct bearing on agency service to the individual, test scores and evaluations from standardized mental ability and aptitude tests, interest inventory results, verified reports of serious and/or repeated behaviors, and other pertinent recorded observations by school personnel.

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[13]Confirmed as correct, or truthful, and/or authentic and arrived at through reasonably objective means such as depositions, standardized procedures, standardized scores, and related scores.

Category III: Unverified data.

Unverified data includes information that has value for the present, such as informal reports which may be needed for counseling or disciplinary actions. Legal or clinical findings, including personality test results, may also be included.

Data in Category I should be maintained in perpetuity, subject to the conditions of security, consent, and access described in this paper. Data in all three categories should be reviewed periodically. All data should be destroyed when its usefulness is judged to be ended. Formal procedures should be established which would allow individuals and/or parents to challenge the accuracy and retention of any of the data included in Categories I, II, and III.

It is recommended that schools or agencies create an official review panel composed of persons, not limited to school employees, to sit in judgment whenever the accuracy, validity, and retention of Categories I, II, and III data are challenged.

In practice, a fourth group of personal data is collected. Professional personnel working with agencies maintain personal and confidential notes and other memory aids. All such data should be controlled by formally adopted rules of maintenance which conform to professional ethics, are subject to the terms of the employment contract between the agency and the professional personnel, and also are limited by any special agreements between the professional and the individual and/or parents involved. Such data is unofficial and has usefulness only to the collector and may not be considered record. The data has immediacy of use and is destroyed when the usefulness is ended.

ACCESS AND RELEASE OF PERSONAL DATA

The person who has been appointed as custodian of personal data should be responsible for controlling access to the data according to established policy. Every agency should have provisions to protect personal records from examination by unauthorized persons, both inside and outside the agency.

When an individual reaches the age of 18, only his consent is needed for access to and dissemination of the data. Prior to age 18, any individual, his parents or guardian, or their legal representative must have access to all records. This includes Categories I, II, and III records.

Data stored in computerized data banks pose special problems of maintenance, security, and access. When data banks contain information about agencies and their services, confidentiality of the data is not an issue. When, however, data banks contain information about individual clients, the protection of the privacy of the individual is very important. Each agency should explore these problems fully and develop procedures for dealing with them in accordance with the record-security program for the agency.

ROLE OF STATE DEPARTMENT OF EDUCATION

Overall Mission

The mission of the State Department of Education is to promote, establish, develop, and to evaluate personal record management programs K-14.

1. The State Department of Education will promote, establish, and conduct seminars, workshops and conferences for the development of personal record management programs and/or personnel.

2. The State Department of Education will provide leadership for promoting, developing, abstracting and disseminating personal record management materials and information for school use.

3. The State Department of Education will provide consultative services for the development of personal record management programs and/or personnel.

STATE-WIDE GOALS FOR MANAGEMENT INFORMATION SYSTEM

In an effort to fulfill the responsibilities related to personal record management, the State Board of Education adopted the following sub-goals and objective on July 6, 1972.

IV.D.1 Management Information System

Sub-Goal -- The KSDE Data Processing Section should coordinate the development and implementation of a management information system (MIS) which will have the capability to collect, analyze, and report timely education information to all segments of the Kansas educational system and to develop guidelines which will coordinate all MIS sub-systems.

a. Objective -- By 1976, the KSDE should provide the major coordination and implementation effort of a MIS for the Kansas educational system.

Appendix A

SPECIAL EDUCATION FOR EXCEPTIONAL CHILDREN ACT

An ACT concerning special education; amending K.S.A. 1973 Supp. 72-933, and repealing the existing section; also repealing K.S.A. 72-923 to 72-932 inclusive, 72-935 to 72-951, inclusive, 72-953 to 72-960, inclusive, and K.S.A. 1973 Supp. 72-952.

The following is a selected portion of the ACT:

K.S.A. 72-973. The hearing provided for in section 13 of this act shall be held at a time and place reasonably convenient to the parents or guardians of the involved child, shall be a closed hearing unless the parents or guardians shall request an open hearing, and shall be conducted in accordance with rules and regulations relating thereto adopted by the board. Such rules and regulations shall afford procedural due process, including the following:

(a) The right of the child to have counsel of his own choice present and to receive the advice of such counsel or other person whom he may select;

(b) the right of the parents or guardians of the child to be present at the hearing;

(c) the right of the child and his counsel or advisor to hear or read a full report of the testimony of witnesses responsible for recommending the proposed action and of any other material witnesses;

(d) the right of the child to present his own witnesses in person or their testimony by affidavit, including expert medical, psychological or educational testimony;

(e) the right of the child to testify in his own behalf and give reasons in opposition to the proposed action;

(f) the right of the child to have an orderly hearing; and

(g) the right of the child to a fair and impartial decision based on substantial evidence.

The person or persons who conduct the hearing shall be certificated employees but shall not be the same person or persons responsible for recom-

mending the posed action upon which said hearing is based.

At a reasonable time prior to the hearing, the parents or guardians or counsel of the involved child shall be given access to all records, tests, reports, or clinical evaluations relating to the proposed action.

Appendix B

Article 90 — EVALUATION OF CERTIFICATED PERSONNEL

K.S.A. 72-9001 et seq.

72-9005. Evaluation documents; presentation to employee; acknowledgment; limited availability. Whenever any evaluation is made of an employee, the written document thereof shall be presented to the employee, and the employee shall acknowledge such presentation by his signature thereon. At any time not later than two (2) weeks after such presentation, the employee may respond thereto in writing. Except by order of a court of competent jurisdiction, evaluation documents and responses thereto shall be available only to the evaluated employee, the board, the administrative staff making the same, the state board of education as provided in K.S.A. 72-7515, the board and the administrative staff of any school to which such employee applies for employment, and other persons specified by the employee in writing to his board. (L. 1973, ch. 281, & 5; July 1.)

Appendix C

Article 2.-- RECORDS OPEN TO PUBLIC

K.S.A. 45-201 et seq.

45-201. Official public records open to inspection; exceptions. All official public records of the state, counties, municipalities, townships, school districts, commissions, agencies and legislative bodies, which records by law are required to be kept and maintained, except those of the juvenile court which shall be open unless specifically closed by the judge or by law, adoption records, records of the birth of illegitimate children, and records specifically closed by law or by directive authorized by law, shall at all times be open for a personal inspection by any citizen, and those in charge of such records shall not refuse this privilege to any citizen. (L. 1957, ch. 455, & 1; June 29.)

45-202. Same; photographing records, when; rules. In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any such public records, instruments or documents, any such person shall have the right of access to said records, documents or instruments for the purpose of making photographs of the same while in the possession, custody and control of the lawful custodian thereof, or his authorized deputy. Such work shall be done under the supervision of the lawful custodian of the said records who shall have the right to adopt and enforce reasonable rules governing the said work. Said work shall, where possible, be done in the room where the said records, documents or instruments are by law kept, but if the same in the judgment of the lawful custodian of the said records, documents or instruments be impossible or impracticable, then the said work shall be done in such other room or place as nearly adjacent as may be available. (L. 1957, ch. 455, & 2; June 29.)

45-203. Same; penalties for violations. Any official who shall violate the provisions of this act shall be subject to removal from office and in addition shall be deemed guilty of a misdemeanor. (L. 1957, ch. 455, & 3; June 29.)

Appendix D

Article 75.--STATE BOARD OF EDUCATION

K.S.A. 72-7515

72-7515. (1968 HB 1666, &1.) Same; records and papers open to inspection. All books, records and papers of the board of education or other governing body of each school district, community junior college, area vocational-technical school, or technical institute shall, at all reasonable times, be opened for and available to the state board and its designated officers, employees and agents. (L. 1968, ch. 82, &1; July 1.)

"Education Amendments of 1974" Appendix E
93rd Congress, H. R. 69
Public Law 93-380

PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS

SEC. 513. (a) Part C of the General Education Provisions Act is further amended by adding at the end thereof the following new section:

"PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS

"SEC. 438. (a)(1) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy of denying, or which effectively prevents, the parents of students attending any school of such agency, or attending such institution of higher education, community college, school, preschool, or other educational institution, the right to inspect and review any and all official records, files, and data directly related to their children, including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns. Where such records or data include information on more than one student, the parents of any student shall be entitled to receive, or be informed of, that part of such record or data as pertains to their child. Each recipient shall establish appropriate procedures for the granting of a request by parents for access to their child's school records within a reasonable period of time, but in no case more than forty-five days after the request has been made.

"(2) Parents shall have an opportunity for a hearing to challenge the content of their child's school records, to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein.

"(b) (1) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy of permitting the release of personally identifiable records or files (or personal information contained therein) of students without the written consent of their parents to any individual, agency, or organization, other than to the following--

"(A) other school officials, including teachers within the educational institution or local educational agency who have legitimate educational interests;

"(B) officials of other schools or school systems in which the student intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

"(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 409 of this Act), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection; and

"(D) in connection with a student's application for, or receipt of, financial aid.

"(2) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records, to any persons other than those listed in subsection (b)(1) unless--

"(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

"(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

"(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (c) an administrative head of an education agency or other records which may be necessary in connection with the audit and evaluation of Federally-supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That, except when collection of personally identifiable data is specifically authorized by Federal law, any data collected by such officials with respect to individual students shall not include information (including social security numbers) which would permit the personal identification of such students or their parents after the data so obtained has been collected.

"(4)(A) With respect to subsections (c)(1) and (c)(2) and (c)(3), all persons, agencies, or organizations desiring access to the records of a student shall be required to sign a written form which shall be kept permanently with the file of the student, but only for inspection by the parents or student, indicating specifically the legitimate educational or other interest that each person, agency, or organization has in seeking this information. Such form shall be available to parents and to the school official responsible for record maintenance as a means of auditing the operation of the system.

"(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

"(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

"(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of post secondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

"(e) No funds shall be made available under any applicable program unless the recipient of such funds informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of post secondary education, of the rights accorded them by this section.

"(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

"(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section, according to the procedures contained in section 434 and 437 of this Act."

(b)(1)(i) The provisions of this section shall become effective ninety days after the enactment of section 438 of the General Education Provisions Act.

(2)(i) This section may be cited as the "Family Educational Rights and Privacy Act of 1974."

PROTECTION OF PUPIL RIGHTS

SEC. 514. (a) Part C of the General Education Provisions Act is further amended by adding after section 438 the following new section:

"PROTECTION OF PUPIL RIGHTS

"SEC. 439. All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimental program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project. For the purpose of this section 'research or experimentation program or project' means any program or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques."

(b) The amendment made by subsection (a) shall be effective upon enactment of this Act.

LIMITATION ON WITHHOLDING OF FEDERAL FUNDS

SEC. 515. (a) Part C of the General Education Provisions Act is further amended by adding after section 439 the following new section:

"LIMITATION ON WITHHOLDING OF FEDERAL FUNDS

"SEC. 440. Except as provided in section 438(b)(1)(D) of this Act, the refusal of a State or local educational agency or institution of higher education, community college, school, agency offering a preschool program, or other educational institution to provide personally identifiable data on students or their families, as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance. Such a refusal shall also not constitute sufficient grounds for a denial of, a refusal to consider, or a delay in the consideration of, funding for such a recipient in succeeding fiscal years. In the case of any dispute arising under this section, reasonable notice and opportunity for a hearing shall be afforded the applicant."

(b) The amendment made by subsection (a) shall be effective upon enactment of this Act.

Appendix F

CRITIQUE ON THE CONFLICT OF STATE AND FEDERAL LAW GOVERNING THE ACCESSIBILITY AND AVAILABILITY OF OFFICIAL PUBLIC RECORDS TO CITIZENS

Recommendation:

Amend K.S.A. 45-201 et seq. and K.S.A. 72-7515 to parallel Secs. 512-515, Title V, Public Law 93-380 (20 U.S.C. 1232g -20, U.S.C. 1232i), cited as the "Family Educational Rights and Privacy Act of 1974," and to insure the right of due process and of privacy to parents and students in the accessibility and availability of records to them, government officials, and other persons.

Rationale:

With the exception of certain described records of the juvenile and probate courts, K.S.A. 45-201 et seq. provide that all of the official public records of the state, counties, municipalities, townships, school districts, commissions, agencies and legislative bodies, which records are by law required to be kept, shall at all times be open for personal inspection by any citizen, and those in charge of such records shall not refuse this privilege to any citizen. Such citizen has a right to photograph any of such records. Any official violating the provisions of said law not only may be subject to removal from office, but also may be subject to prosecution for commission of a misdemeanor, the penalties for which may not exceed one (1) year's confinement in the county jail and/or a fine in a sum not to exceed $2,500.

K.S.A. 72-7515, without any restriction whatsoever, provides that all books, records and papers of the board of education, community junior college, area vocational-technical school, or technical institute shall, at all reasonable times, be opened for and available to the state board and its designated officers, employees, and agents.

Whereas the obvious intent of K.S.A. 45-201 et seq. is to open all records of all subdivisions of government to all citizens (with very little restriction), the express purpose of the Family Educational Rights and Privacy Act of 1974 is generally to enhance the accessibility and availability of records to parents and/or students of designated educational institutions which are recipients of federal funds and to restrict such accessibility and availability to others without first obtaining the consent of those whose rights of privacy are involved.

The Congressional Act restricts federal funds to any recipient educational institutions that not only have policies denying or effectively preventing the parents of students the right to inspect and review any and all official records, files and data directly related to their children, (including all material that

is incorporated into each student's cumulative folder), but also that have policies permitting the release of students' personally identifiable records or files, or personal information contained therein, to any individual, agency or organization, other than certain specific officials or persons who have legitimate interests therein, without first obtaining the written consent of their parents, or of the students if the latter are eighteen years of age or older or are attending a post-secondary educational institution. It is the part of the Congressional Act which is referred to in the latter clause that apparently is contrary to or incompatible with K.S.A. 45-201 et seq. Because of the apparent incompatibility of said state and federal laws, it is not possible for the state board of education to issue a policy statement encouraging recipients to develop policies which comply with them. The only control the federal government has is by withholding of its funds.

The Congressional Act: insures to parents and/or students the right of privacy and of due process in challenging the content of their children's school records in order to prevent inaccurate or misleading entries; provides that each recipient establish appropriate procedures for the granting of parents'and/or students' requests for access to the latters' records within a reasonable time (but in no case more than forty-five (45) days); requires that any recipient which has a practice or policy of furnishing in any form any personally identifiable data to any persons, other than those persons who have a legitimate interest, to obtain a written consent from the student's parents that sets out a description of the records to be released, the reasons therefor, the persons to whom they are to be released, and to furnish copies of such records to the parents; prevents officials or persons authorized to have access to students' records from having information which would permit the personal identification of students unless specifically authorized by law; specifies that all persons desiring access to records of students to sign statements which shall be kept permanently in the students' files indicating specifically their legitimate educational interest in seeking such access, and that they will not permit any other persons to have access without the written consent of the parents of the students involved; requires the positive action of recipients to inform all parents and/or students of the rights accorded to them by the Act; provides that all instructional materials used in connection with any research or experimental programs or projects be made available for inspection to the parents or guardians of children engaged in such programs or projects.

The Kansas Legislature in K.S.A. 72-9005 (1973) has already granted a right of privacy and strict record protection for evaluated certified personnel. K.S.A. 72-973 (L. 1974, Ch. 290, Sec. 14(g); 1974 House Bill 1672, New Sec. 14(g) provides parents

or guardians or counsel of prospective special education students access to all records, tests, reports or clinical evaluations at a reasonable time prior to a due process hearing, and said section also provides that hearings shall be closed, unless the parents or guardians request otherwise, presumably for the purpose of protecting the right of privacy of affected parties.

ANNOTATED BIBLIOGRAPHY
SELECTED RESOURCE DOCUMENTS

American Personnel and Guidance Association. Ethical Standards. 1605 New Hampshire Avenue N.W., Washington, D. C. 20009.

The Association has provided this document of Ethical Standards to stimulate greater concern by members for their own professional functioning and for the conduct of fellow professionals such as counselors, guidance and student personnel workers, and others in the helping profession.

Buhler, Henry E., Jr., K. D. Moran, and Floyd A. Vanderpool, Jr. Legal Aspects of Student Records. NOLPE Monograph Series No. 5, Topeka, Kansas: National Organization on Legal Problems of Education, 1972.

The authors present the legal problems associated with the collection and use of information about students by public elementary and secondary schools. After reviewing the history of the right to privacy, they analyze constitutional and statutory provisions, legal cases, and state board of education rules to determine the legal principles that govern the inspection, copying, and expunging of student records.

Children, Parents and School Records. Rioux, J. William and Stuart A. Sandow, Columbia, Maryland: National Committee for Citizens in Education, April, 1974.

This book, a highly informative handbook for citizens, spells out the specific points of concern, gives information on laws and regulations--or lack of them--each state has laid down, provides broad background on the issue and on parental rights and responsibilities, and offers a specific plan of action for concerned citizens. The volume is an indispensable resource for anyone concerned with children's rights to privacy.

George, Thomas W. "The Law and Pupil School Records: Issues and Views." NASSP Bulletin, September, 1972, 132-141.

The author outlines some of the problems of record management, reviews pertinent court cases, and advises school districts to formulate reasonable regulations on pupil record keeping.

Haney, Gerald L. Student Relationships. Ethical and Legal Implications. Topeka, Kansas: Kansas State Department of Education, 1974.

A publication taking into consideration the humanistic relationship as well as the ethical and legal relationships to students. Significant court cases, legal terminology and an extensive bibliography in this area of consideration is contained in this work.

Annotated Bibliography - Continued

Killian, John . "The Law, the Counselor, and Student Records," Personnel and Guidance Journal, February, 1970, 423-432.

The article relates the legal responsibilities of a counselor in the release of information about students. The author, who is an attorney, cites relevant statutes and judicial rulings to illustrate his belief that counselors are relatively safe from legal actions if they perform in a professional and ethical manner and follow certain basic principles.

National Association of Secondary School Principals. Washington, D. C.; September 1, 1971.

This legal memorandum presents a resume of relevant law cases which enable principals and others to evaluate current procedures and to prepare, where necessary, new guidelines and standards relating to student records. The issues exemplified are parents and student records, outsiders and student records, confidentiality of personnel records, school board members and student records, and high school-college relationship.

National School Boards Association. Board Policies on Student Records. Educational Policies Development Kit. Waterford, Conn: Educational Policies Service, 1972. ED 066 819.

One of a series of Kit-booklets issued to help school boards develop written policies in key subject areas. Samples are provided to encourage thinking in policy terms. Policy samples include information on privacy of student records, dissemination of student records, student and parent access to records, and clarification of student records.

Russell Sage Foundation. Guidelines for the Collection, Maintenance and Dissemination of Pupil Records. Report of a conference on the ethical and legal aspects of school record keeping. Sterling Forest, N. Y.: Sterling Forest Conference Center, May 25-28, 1969.

These guidelines are the major source for most of the material concerned with the collection, maintenance, and dissemination of pupil records. It offers sample forms for a routine information letter, permission to collect data, record of inspection of pupil records, notification of transfer of permanent pupil records, and request for permission to release permanent school records to third party.

Vanderpool, Floyd A. "A Guide for Keeping Student Records--and Getting Rid of Them," American School Board Journal, April, 1971, 25-26.

The author offers recommendations for school boards to design policy so the privacy of the individual school child is protected while all school records required by law are open to inspection.

Supplement - Proposed Regulations

F E D E R A L R E G I S T E R

Monday, January 6, 1975
Washington, D.C.
Volume 40 - Number 3
Part III

DEPARTMENT OF
HEALTH
EDUCATION, AND
WELFARE

Office of the Secretary

Privacy Rights Of Parents And Students

DEPARTMENT OF HEALTH
EDUCATION, AND WELFARE

Office of the Secretary
(45 CFR Part 99)
Privacy Rights of Parents And
Students
Proposed Establishment of Part

Pursuant to the authority contained in section 438 of the General Education Provisions Act (Title IV of Pub. L. 90-247, as amended), added by section 513, Pub. L. 93-380 (enacted August 21, 1974), and amended by Senate Joint Resolution 40 (Sen. J. Res. 40), (1974) notice is hereby given that the Secretary proposes to add a new Part 99 to Title 45 of the Code of Federal Regulations to read as set forth below.

Section 438 of the General Education Provisions Act, as amended, which is effective as of November 19, 1974, sets out requirements designed to protect the privacy of parents and students. Specifically, the statute governs (1) access to records maintained by certain educational institutions and agencies, and (2) the release of such records. In brief, the statute provides: that such institutions must provide parents of students access to official records directly related to the students and an opportunity for a hearing to challenge such records on the grounds that they are inaccurate, misleading or otherwise inappropriate; that institutions must obtain the written consent of parents before releasing personally identifiable data about students from records to other than a specified list of exceptions; that parents and students must be notified of these rights; that these rights transfer to students at certain points; and that an office and review board must be established in HEW to investigate and adjudicate violations and complaints of this section. The office has been designated by the Secretary and may be contacted at the following address:
Mr. Thomas S. McFee
Room 5660
Department of Health, Education, and Welfare
330 Independence Avenue, S.W.
Washington, D.C. 20201
Telephone (202) 245-7488

(The statute further provides, under subsection (c), that the Secretary shall promulgate regulations to protect the privacy of students and their families in connection with certain Federal data-gathering activities. The proposed rules set forth below relate to all of section 438 except subsection (c), which will be the subject of further regulations to be issued at a future date.)

For the convenience of readers, section 438, (except subsection (c)) as amended reads as follows:

Sec. 438.(a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or a such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended:

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations—

(I) respecting admission to any educational agency or institution.

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be recurred (sic) as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at

such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which --

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

(B) The term "education records" does not include --

(i) records of institutional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1), the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, which are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or para-professional acting in his professional or para-professional capacity, or assisting in that capacity, and which are created, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment; provided, however, that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifable information, but does not include a person who has not been in attendance at such agency or institution.

(b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following--

(A) other school officials, including teachers within the educational institution or local educational agency who have been determined by such agency or institution to have legitimate educational interests;

(B) officials of other schools or school systems in which the student seeks or, intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 408(c) of this Act), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection; and

(D) in connection with a student's applications for, or receipt of, financial aid;

(E) State and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1954; and

(I) subject to regulations of the Secretary in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

(2) No funds shall be made available under any applicable program to any education agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless--

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

Although the amendments to section 438 have resolved a number of issues originally raised about the statute, some new issues have been raised. In large part, the new statutory language has been repeated in these proposed rules. It may be necessary to further develop the rules in several areas as a result of the recent changes.

In order to facilitate comments, explanations of many of the substantive sections of the proposed rules are set out below. "Comment" sections following substantive sections were used as a format in lieu of a lengthy preamble for ease of reading and to highlight the substance of the proposed rules. The "comment" sections include several citations to the legislative history accompanying the amendments to section 438 (Cong. Rec. S. 21484-91 (daily ed., December 13, 1974) and H. Rept. No. 93-1619 (1974), at Cong. Rec. H. 12157-60 (daily ed., December 17, 1974)).

Reviewers should also note that where statutory language is repeated in the proposed rules, it is so indicated by use of brackets. The brackets will be deleted when the final regulations are published. With respect to the bracketed material, comments should be directed to the need (or lack of a need) for regulations, rather than to its substance.

Interested persons are invited to submit written comments, suggestions, or objections regarding the proposed regulations to the School Records Task Force; c/o Room 5660, Department of Health, Education, and Welfare; 330 Independence Avenue, S.W.; Washington, D.C. 20201.

Comments received in response to this notice will be available for public inspection at the above office on weekdays during regular business hours. All relevant material received on or before March 7, 1975, will be considered.

Dated:

CASPAR W. WEINBERGER,
Secretary of Health,
Education, and Welfare.

PART 99--PRIVACY RIGHTS OF PARENTS AND STUDENTS

Subpart A - General

Sec.
99.1 Applicability of part.
99.2 Purpose.
99.3 Definitions.
99.4 Student rights.
99.5 Notification by educational institutions.
99.6 Waivers.

Subpart B - Access to Records

99.11 Access.
99.12 Limitations on access.
99.13 Access rights.
99.14 Destruction of records.
99.15 Procedure for granting access.

Subpart C - Challenges to the Content of Records

99.20 Right to hearing.
99.21 Informal proceedings.
99.22 Formal proceedings.

Subpart D - Release of Personally Identifiable Records

99.30 Consent.
99.31 Content of consent.
99.32 Copy to be provided to parents or eligible students.
99.33 Authority of parent to give consent.
99.35 Release of information for health or safety emergencies.
99.36 Release to other school officials.
99.37 Release to Federal and State officials.
99.38 Record of access.
99.39 Transfer of information by third parties.
99.40 Directory information.

Subpart E - Enforcement

99.60 Office and review board.
99.61 Assurances required - general.
99.62 Assurances required - subgrants and subcontracts.
99.63 Assurances - conflict with State or local law.
99.64 Reports and records.
99.65 Complaint procedure.
99.66 Termination of funding.
99.67 Hearing procedures.
99.68 Hearing before Panel or a Hearing Officer.
99.69 Initial decision; final decision.

AUTHORITY: Sec. 438, Pub. L 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g) unless otherwise noted.

Subpart A - General

Sec. 99.1 Applicability of Part.

(a) This part applies to all educational institutions to which funds are made available under any Federal (program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.) (20 U.S.C. 1230, 1232g)

(b) This part does not apply to an educational institution solely because students attending that institution receive benefits under one or more of the Federal programs referenced in paragraph (a) of this section, if no funds under those programs are made available to the institution itself. (20 U.S.C. 1232g)

Comment

This section specifies the educational institutions which are subject to the requirements of this Part. Section 438 of the General Education Provisions Act, as amended (GEPA), sets out requirements for educational agencies and institutions receiving funds under "applicable program." Section 400 of GEPA defines "applicable program" to include programs administered by the Assistant Secretary for Education (ASE), the Commissioner of Education, and the Director of the National Institute of Education (NIE) "except where otherwise specified." Section 421 appears to be such a specified exception, since it limits coverage of Part C of GEPA to programs administered by the Commissioner:

The provisions of this part shall apply to any program for which the Commissioner has administrative responsibility, as specified by law or by delegation of authority pursuant to law.

Section 438 was added to Part C of GEPA by Pub. L. 93-380 and therefore the requirements imposed by this section relate only to those institutions receiving funds from programs administered by the commissioner.

As explained in the "Joint Statement in Explanation of Buckley/Pell Amendments" which accompanied the recent amendments to section 438:

* * * by explicity limiting the definition to those institutions participating in applicable programs, the amendment makes it clear that the Family Educational Rights and Privacy Act applies only to Office of Education programs and those programs delegated to the Commissioner of Education for administration * * * (t) here has (sic) been some questions as to whether the Amendment's provisions should be applied to other HEW education-related programs such as Headstart or the educational research programs of the National Institute of Education. As rewritten, the limited nature of the Act's coverage should be clear. (Emphasis supplied) (Cong. Rec. S. 21488 (daily ed., December 13, 1974))

These requirements apply to all educational institutions which receive funds under programs administered by the Commissioner, but not, for example, to private schools which do not receive funds but whose students receive services under these programs through public educational institutions.

If a public educational institution maintained records on a private school student, the parents of that student would have the rights set out below regarding such records to the extent that such private school student could be said to be in attendance at the public institution.

A partial list of programs for which the Commissioner has administrative responsibility are set forth in the FEDERAL REGISTER of June 28, 1973, at 38 FR 17032, as amended. This list does not include programs added since April 13, 1970 (Pub. L. 91-230). (For some additional programs, see Pub. L. 92-318 (the Education Amendments of 1972) and Pub. L. 93-380 (the Education Amendments of 1974).)

Sec. 99.2 Purpose

The purpose of this part is to set forth requirements governing the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended. (20 U.S.C. 1232g)

Sec. 99.3 Definitions

As used in this Part:
"Act" means the General Education Provisions Act, Title IV of Pub. L. 90-247, as amended. (20 U.S.C. 1232g)

"Commissioner" means the U.S. Commissioner of Education. (20 U.S.C. 1232g)

"Directory information" means a (student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency of institution attended by the student.) (20 U.S.C. 1232 (a) (5) (A))

"Educational institution" or "educational agency or institution" means (any public or private agency or institution which is the recipient of funds under any) Federal program referenced in 99.1 (a). (20 U.S.C. 1232g(d))

"Eligible student" means a student who (has attained eighteen years of age, or is attending an institution of postsecondary education). (20 U.S.C. 1232 (a) (3))

"Education records" (a) mean (those records, files, documents, and other materials which) (1) (contain information directly related to a student; and) (2) (are maintained by an educational agency or institution, or by a person acting for such agency or institution.)

(b) The term does not include: (1) (records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;)

(2) (if the personnel of a law enforcement unit do not have access to education records under) 99.30, (the records and documents of such law enforcement unit which (i) (are kept apart from records described in) (a), (ii) (are maintained solely for law enforcement purposes, and) (III) (are not made available to persons other than law enforcement officials of the same jurisdiction.)

(3) (in the case of person who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or)

(4) (records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, which are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or para-professional acting in his professional or para-professional capacity, or assisting in that capacity, and which are created, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment; provided, however, that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.) (20 U.S.C. 1232g (a) (4) (A), (B))

"Institution of postsecondary education" means an institution which provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided, as determined under State law. (20 U.S.C. 1232g(d))

"Office and review board": The terms "Office" and "Review Board" mean the office and the review board described in 99.60. (20 U.S.C. 1232g)

"Panel" means a Hearing Panel, as described in 99.67(a). (20 U.S.C. 1232g(g))

"Parent" means a natural parent, an adoptive parent, or the legal guardian of a student. (20 U.S.C. 1232g)

"Party" means an individual agency or organization. (20 U.S.C. 1232g(b) (4) (A))

"Personally identifiable" means that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make it possible to identify the student with reasonable certainty, or (e) other information which would make it possible to identify the student with reasonable certainty. (20 U.S.C. 1232g)

"Records" means information or data recorded in any medium, including, but not limited to: handwriting, print, tapes, film, microfilm, and microfiche. (20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Health, Education, and Welfare. (20 U.S.C. 1232g)

"Student" (a) means any person who is attending or has attended an educational institution and (with respect to whom) that (institution maintains education records or personally identifiable information). (b) The term (does not include a person who has not been in attendance at such) (institution.) (20 U.S.C. 1232g (a) (1), (2), and (6))

COMMENT

Most of the definitions repeat statutory language. The definition of "educational institution" repeats the statutory language in section 438(a) (3). Questions regarding educational institutional vis-a-vis their component units are addressed in later substantive sections: for example, the extent to which an institution (if it is a local school system or a university system) would face fund termination for violations of this part by a unit of that institution; and the question whether the various units may release records to each other without obtaining parental consent. See Sec. 99.30 (a) and (b), and 99.66.

The definition of "education records" repeats the statutory language in section 438 (a) (4).

With respect to this definition, the Conference report on Sen. J. Res. 40 states:

It is the intention of the conferees that the Department of Health, Education, and Welfare interpret the term "treatment" narrowly to limit the exemption for such records to those similar to those enumerated. It is not intended to apply to remedial educational records made or maintained by education professionals or paraprofessionals. (H. Rept. No. 93-1619 (1974), at Cong. Rec. H. 12157, 12160 (daily ed. December 17, 1974))

The definition of "personally identifiable" is based on language in the Conference Report (House Rep. 93-1211, p. 188 (1974)) on H.R. 69 (which became P.L. 93-380) that the phrase includes any information "which can easily be traced to students." Students can be personally identified in more ways than a name or number.

The term "record" is defined broadly to include all information and data maintained on a student in any medium.

This definition of "student" is based on sections 438(a) (1), (2) and (6). Subsections (a) (1) and (2) make it clear that former students are included in the term "student", as used in Section 438. Subsection (a) (6) makes it clear that applicants for admission are not granted rights under this legislation. However, once an "applicant" becomes a "student" by enrolling in and attending the institution, any admissions file which is an "education record" would become available.

Sec. 99.4 Student Rights.

(a) For the purposes of this part, (whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.) (20 U.S.C. 1232g(d))

(b) Section 438 of the Act shall not be read to preclude educational institutions from affording to students rights similar to those afforded to parents of students under that section. (20 U.S.C. 1232g)

COMMENT

This section sets out the requirements of section 438(d), which transfers the rights accorded to parents under section 438 to the students themselves, referred to in these regulations as "eligible students". See the definitions in 99.3. Section 438 (d) does not speak to the question of whether students may have rights comparable to those in section 438 con-currently with their parents before they reach age 18 or the postsecondary level of education. Such rights of students may be provided by State or local law or by institutional practice. "Student rights" are not limited by the legislation. This interpretation avoids some problems: students not having access to their own records, especially where they may be in an adversary relationship to their parents; teachers not being able to discuss the student's records with the student without parental consent; institutions not being able to release report cards to students wihout parental consent; students under 18 not being able to request their transcripts be sent to colleges or employers without parental consent; and so forth.

It is clear from the use of the word "only" in the statutory language, however, that once students reach age 18, or the postsecondary level prior to age 18, their parents no longer have any of the rights set out herein, except as provided in 99.30 (h).

Sec. 99.5 Notification by educational institutions.

(a) Each educational institution to which this part applies and which maintains records on students, shall inform (parents) and eligible students (of the rights accorded them) by this part. (20 U.S.C. 1232 (e))

(b) In meeting the requirement set forth in paragraph (a) of this section, the educational institution shall provide notice to parents and eligible students, at least annually, of the following:

(1) the types of education records and information contained therein which are directly related to students and maintained by the institution:

(2) the name and position of the official responsible for the maintenance of each type of record, the persons who have access to those records, and the purposes for which they have access:

(3) the policies of the institution for reviewing and expunging those records;

(4) the procedures established by the institution under 99.13;

(5) the procedures (including those set forth in subpart C of this part) for challenging the content of education records;

(6) the cost if any which will be charged to the parent to eligible student for reproducing copies of records under 99.13(c);

(7) (the categories of information which) the institution (has designated as) directory information under 99.40.

(8) the other rights and requirements set forth in this part.

(c) The notice provided to a parent or eligible student under this section shall be in the language of the parent or eilgible student. (20 U.S.C. 1232g (a) (5) (B) and (e))

COMMENT

This section is based upon the requirement in section 438(e) that institutions "inform the parents * * * of the rights accorded them by this section (438)" and the requirement for notice in section 438 (a) (5) (B).

The requirement in paragraph (b) that notice must be provided at least annually is intended to make the notice requirement meaningful and to ensure that parents and students are likely to actually receive notice. It does not prescribe what means may be reasonable because what might be reasonable for a one-room schoolhouse would not be reasonable for a university.

Paragraph (b) (1) requires that parents be informed about what types of records relating to students are maintained by the institution so that they can determine what records they might want to review.

Paragraph (b) (2) is necessary so that the parents will know who controls the records and release of information from the records and what parties may obtain information without their consent.

Paragraph (b) (3) is necessary so the parents will know exactly how and when to request a hearing and what procedures must be used.

Paragraph (b) (5) is necessary so that the parents will know how much it will cost to make copies of any part of a record, and who must bear the cost in a given situation.

Paragraph (b) (6) is necessary to ensure that institutions inform parents of any other rights set out herein, such as access rights and when rights transfer to student.

Paragraph (b) (7) is intended to implement the notice requirement of section 438 (a) (5) (B).

Sec. 99.6 Waivers.

(a) Educational institutions shall not require parents or eligible students to waive their rights under this part. (Cong. Rec. S. 21489 (daily ed., December 13, 1974))

(b) (A student or a person applying for admission may waive his) or her (right of access to confidential statements described in) 99.12(c) (except that such waiver shall apply to recommendations only if) (1) (the student is, upon request, notified of the names of all persons making confidential recommendations and) (2) (in the case of recommendations described in) 99.12 (c) (such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.) (20 U.S.C. 1232g (a)(1)(B) and (C))

COMMENT

Since an educational institution is precluded from "effectively preventing the exercise of access rights in section 438(a) (1), an institution could not require students to waive such rights. However, section 438(a)(1) (B) and (C) allows students to waive their rights under certain conditions.

Subpart B - Access to Records

Sec. 99.11 Access.

Educational agencies or institutions shall provide parents of students (or eligible students) (who are or have been in attendance at a school of such agency or at such institution, as the case may be) access to (the education records of) the students, except as set out in 99.12. (20 U.S.C. 1232g (a)(1)(A))

COMMENT

The language "shall provide parents of students (or eligible students) access" is used in place of the statutory language "policy of denying, or which effectively prevents * * * the right to inspect and review" and "shall establish appropriate procedures for the granting of a request * * * for access." The former states succinctly what is required for the educational institution and is intended to foreclose any interpretation that might be advanced that an educational institution would not be violating the law if it did not have a "policy" of denying access, even though it "effectively prevented" access on an ad hoc basis or in other limited circumstances.

Sec. 99.12 Limitations on access.

Educational institutions are not required to (make available to students in institutions of postsecondary education the following materials:)

(a) (Financial records of the parents of the student or any information contained therein;)

(b) (Confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;)

(c) (If the student has signed a waiver of the student's right of access under this subsection in accordance with) 99.6(b), confidential recommendations)

(1)(respecting admission to any educational agency or institution.)

(2) (respecting an application for employment and)

(3) (respecting the receipt of an honor or honorary recognition).

COMMENTS

This section sets out the limitations on access in section 438(a)(1)(B).

Sec. 99.13 Access rights.

The right of access specified in Sec. 99.11 shall include:

(a) The right to be provided a list of the types of education records which are maintained by the institution and are directly related to students:

(b) (The right to inspect and review) the content of those records;

(c) The right to obtain copies of those records, which may be at the expense of the parent or the eligible student (but not to exceed the actual cost to the educational institution of reproducing such copies);

(d) The right to a response from the institution to reasonable requests for explanations and interpretations of those records;

(e) The right to an opportunity for a hearing to challenge the content of those records under subpart C of this part; and

(f) (If any material or document in the education record of a student includes information on more than one student,) the right (to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.) (20 U.S.C. 1232g (a)(1)(A))

COMMENTS

Section 438(a)(1)(A) establishes a right "to inspect and review" and provides that procedures must be established for allowing access. This section attempts to make a "right of access" meaningful. Authority for making such judgments may be found in section 438(f) which states that the Secretary shall take "appropriate actions" to enforce provisions of the section. "Appropriate actions" may be interpreted to include the issuance of regulations which further the statutory intent.

Paragraph (a) is necessary because access could not be meaningful if parents or eligible students were not informed of what types of records the institution might have on a student.

Paragraph (b) sets out statutory requirements.

Paragraph (c) is necessary because a right to obtain copies is an essential part of a right of access. It should be noted that a counterargument may be made against including a right to copy; such a right might subject parents or students to undesirable pressures from third parties to turn over their entire records (for third parties to make admission, employment, credit rating, or other decisions) and that such a right should not be included in a right of access.

Paragraph (d) is necessary so that parents or eligible students may have an opportunity to have any part of the record explained to them.

Paragraph (e) sets out the section 438 (a)(2) requirement which is set out more fully in subpart C;

Paragraph (f) sets out statutory language of section 438(a)(1)(A)). The Buckley/Pell statement contains the following elaboration:

In general, it is intended that the parent would be shown the actual documents contained in the child's education records. However, under certain circumstances this might not be possible -- where, for instance, it is impossible to separate information about one student from that about others. If a student's name is one in a long list of names, it would violate the others' right to privacy to have the entire list shown to that student's parents. In such a situation, the responsibility of the educational agency or institution is to make the information concerning the student known to the parent without actually having to show him the document. (Cong. Rec. S. 21488 (daily ed., December 13, 1974)

Sec. 99.14 Destruction of records.

Educational institutions are not precluded under this part from destroying any records, if not otherwise precluded by law, except that access shall be granted under 99.11 prior to the destruction of education records where the parent or eligible student has requested such access. (20 U.S.C. 1232g(a))

COMMENT

The statute does not by its terms preclude the destruction of records.

In a floor discussion of the amendment to section 438, the following colloquy took place between Senators McIntyre and Pell:

Mr. McIntyre * * * I would appreciate the Senator's telling me whether my understandings on these three points are correct.

The act is not designed to require the retention of records or to require that institutions continue to retain and use records that have been used in the past. In fact, it could be said that the act's purposes are best achieved when fewer records are kept and used.

Mr. Pell * * *the points he has raised are correct. (Cong. Rec. S. 21484, (daily ed., December 13, 1974))

It seems reasonable to assure that it would be appropriate for institutions to review their record-keeping policies and remove and destroy inappropriate or useless data which should not be maintained. However, it would not be consistent with the underlying purposes of the legislation for institutions to destroy information after parents have requested access to it without allowing the parents an opportunity to review the information.

Sec. 99.15 Procedures for granting access.

Each educational institution (shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children) or by eligible students for access to their own education records (within a reasonable period ot time, but in no case) shall access be withheld (more than forty-five days after the request has been made.)

COMMENT

This section is drawn from section 438(a)(1)((A)) of this Act.

Subpart C - Challenges to the Content of Records

Sec. 99.20 Right to a hearing.

Each educational agency and institution shall provide parents (of students), and eligible students, (who are or have been in attendance at a school of such agency or at such institution) (an opportunity for a hearing by such agency or institution) (to challenge the content of such students' education records in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents) and eligible students (respecting the content of such records.)

COMMENT

This section is drawn from section 438 (a)(2) of the Act.

The Buckley/Pell Statement provides the following elaboration as to what types of hearings and challenges are contemplated by section 438 (a)(2):

The amendment is intended to require educational agencies and institutions to conform to fair information record-keeping practices. It is not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution. It is intended, however, to open the bases on which decisions are made to more scrutiny by the students, or their parents about whom decisions are being made, and to give them the opportunity to challenge and to correct-or at least enter an explanatory statement-inaccurate, misleading, or inappropriate information about them which may be in their files and which may contribute, or have contributed to an important decision made about them by the institution.

The law intends that parents have a full and fair opportunity to present evidence to show that their children's records contain inaccurate, misleading or otherwise inappropriate information. The hearing should be held and the institution's decision rendered within a reasonable period after the parent's request. There has been much concern that the right to a hearing will permit a parent or student to contest the grade given the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, the parents or student could seek to correct an inproperly recorded grade, but could not through the hearing required pursuant to this law contest whether the teacher should have assigned a higher grade because the parents or student believe that the student was entitled to the higher grade.

On the other hand, if a child has been labeled mentally or otherwise retarded and put aside in a special class or school, parents would be able to review the materials in the record which led to this institutional decision, and perhaps seek professional assistance, to see whether these materials contain inaccurate information or erroneous evaluations about their child. (Cong. Rec. S.21488 (daily ed., December 13, 1974).)

Sec. 99.21 Informal Proceedings.

Educational institutions may attempt to settle a dispute with the parent of a student or the eligible student regarding the content of the student's education records through informal meetings and discussions with the parent or eligible student. (20 U.S.C. 1232g(a)(2))

COMMENT

Section 438(a)(2), which requires "an opportunity for a hearing" does not preclude attempts to settle disputes by informal means. Formal hearing procedures may only be necessary when such informal means are not satisfactory to the parent (or eligible student.) or the educational institution.

Sec. 99.22 Formal Proceedings.

Upon the request of either party (the educational institution or the parent (or eligible student)), the hearing required by 99.20 shall be conducted under the procedures adopted and published by the institution under 99.5(b)(5). Such procedures shall include at least the following elements:

(a) The hearing shall be conducted and decided within a reasonable period of time following the request for the hearing;

(b) The hearing shall be conducted, and the decision rendered, by an institutional official or other party who does not have a direct interest in the outcome of the hearing;

(c) The parents or eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under 99.20; and

(d) The decision shall be rendered in writing within a reasonable period of time after the conclusion of the hearing. (20 U.S.C. 1232g(a)(2))

COMMENT

This section specifies certain due process procedures which are felt to be needed for a full and fair hearing.

The Buckley/Pell Statement provides the following guidance:

The law is not specific concerning the format, procedure, or mechanism for the conduct of such a hearing at the local level. It is the intent of the sponsors of these amendments that again a rule of reason would be followed by those participants involved. Since the hearing is to be conducted at the local level, a detailed specification of procedures cannot be drawn that could possibly apply to each of the thousands of school districts and colleges across the nation. Each has a slightly different organizational structure and pattern of procedure. Obviously, the hearing mechanism must be adapted in each instance to conform to these individual differences. In some cases, a school district might wish to offer the parent a hearing at the district level; in other instances, disputes about the content of records might be better handled at the local school level. It is not the intent of the Amendment to burden schools with onerous hearing procedures.

Subpart D - Release of Personally Identifiable Records

Sec. 99.30 Consent.

Educational institutions shall not permit access to or (the release of education records or personally identifiable information contained therein other than directory information) (of students without the written consent of their parents) (or the written consent of their parents) (or the written consent of an eligible student, to any party other than the following:

(a) (Other school officials, including teachers within the educational institution or local educational agency who have been determined by such agency who have been determined by such agency or institution to have legitimate educational interests;)

(b) (Officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;)

(c) Subject to the conditions set forth in 99.37. (authorized representatives of (1) the Comptroller General of the United States, (2) the Secretary.) (3) the Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education (20 U.S.C. 1221e-3(c)), or (4) (State educational authorities;)

(d) (In connection with a student's application for, or receipt of, financial aid;)

(e) (State and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;) (Nothing in) (this paragraph shall prevent a State from further limiting the number of type of State or local officials who will continue to have access thereunder;)

(f) (Organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;)

(g) (Accrediting organizations in order to carry out their accrediting functions;)

(h) (Parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1954;) or

(i) (In compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or supoenas in advance of the compliance therewith by the educational institution.)

COMMENT

This section sets out the general consent requirement (and exceptions thereto) for releasing data from student records. (See section 438(b) (1) and (2) (the latter for the limitation on access as well as release) and the exceptions set out in sections 438(b) (1) (A)-(H) and 438(b) (2) (B).)

Paragraph (a) sets out the statutory language of (b) (1) (A). It should be noted that the term "transfer" in paragraph (b) refers to the transfer of the student's record, and not the transfer of the student.

Paragraph (c) includes a list of those officials who come within the definition of "administrative heads of education agencies" under section 408(c) of GEPA, rather than referencing a definition elsewhere in GEPA (for ease of comprehension).

Paragraphs (d)-(h) set out 438 (b)(1)(D)-(H). Subparagraphs (E)-(H) were added in the amendment to section 438.

Paragraph (i) sets out 438(b)(2)(B) as being a fifth exception to the 438 (b)(1) requirement for parental consent.

It should be noted that the requirements in section 438(b) relate only to release of recorded data or information from recorded data that is personally identifiable. There are no restrictions on oral communications not based on information from education records, nor does section 438 forbid release of data that is not personally identifiable to a student or his or her family (for example, release of statistical information.)

Sec. 99.31 Content of Consent.

Where the consent of a parent or eligible student is required under this part for the release of education records, it shall be in writing, be signed and dated by the person giving such consent, and shall include (a) a specification of the (records to be released,) (b) (the reasons for such release), and (c) the names of the parties (to whom) such records will be released. (20 U.S.C. 1232g(b)(1), (2)(A))

COMMENT

This section is based on section 438(b)(1) and (b)(2) of this Act.

Sec. 99.32 Copy to be provided to parents or eligible students.

Where the consent of a parent or eligible student is required under this part for the release of education records, (a copy of the records to be released) shall be provided on request to (a) (the student's parents) (or the eligible student) and (b) (the student) who is not an eligible student, (if desired by the parents). (20 U.S.C. 1232g(b)(2)(A)

COMMENT

This section sets out one of the requirements of section 438(b)(2)(A) and interprets the phrase "if desired by the parents" as modifying both "parents" and "the student" so that c pies need not be automatically sent out whether or not desired by the parents. This seems justifiable because the parents or eligible students may be seeking the release of data for their own purposes and may not want a copy of anything released (for example, they would not necessarily want a copy of anything released (for example, they would not necessarily want a duplicate copy of a transcript each and every time they want it sent to a college). Further, it would be wasteful to require institutions to provide copies for the parents if they do not want copies. In any case, the regulation provides parents and eligible st nts with the right to obtain copies on request.

Sec. 99.33 Authority of Parent to Give Consent.

(a) Except as otherwise provided in this section, any parent of a student may give a written parental consent required under this part.

(b) Where parents are separated or divorced, a written parental consent required under this part may be obtained from either parent, subject to any agreement between such parents or court order governing the rights of such parents.

(c) In the case of a student whose legal guardian is an institution, a party independent of the institution shall be appointed pursuant to State and local law to give a written parental consent required under this part. (20 U.S.C. 1232g(b)(1),(2))

COMMENT

This section attempts to make clear what is meant by "parental" consent.

Paragraph (a) provides that consent is required of only one parent.

Paragraph (b) is proposed to deal with situations where court orders or separation agreements affect the rights of the parents to exercise control over decisions affecting the child.

Paragraph (c) is designed to avoid situations where institutions may have interests adverse to those of the child and should not control decisions about what information may be released about the child (for example, if the institution is approached by a researcher who will provide grant funds to the institution for a study of the children, the institution may not make a decision which adequately protects the children's privacy rights.) The child/student should be represented by a third party who has no conflicting interests.

There may still be problems under this provision if the third party guardian is not duly appointed.

Sec. 99.35 Release of Information for Health or Safety Emergencies.

(a) Educational institutions may release information from education records to (appropriate persons) (in connection with an emergency) (if the knowledge of such information is necessary to protect the health or safety of a student or other persons.)

(b) The factors which should be taken into account in determining whether records may be released under this section include the following:

(1) The seriousness of the threat to the health or safety of the student or other persons;

(2) The need for such records to meet the emergency ;

(3) Whether the persons to whom such records are released are in a position to deal with the emergency; and

(4) The extent to which time is of the essence in dealing with the emergency.

(c) Paragraph (a) of this section will be strictly construed. (20 U.S.C. 1232g(b)(1)(I))

COMMENT

This section is required by section 438 (b)(1)(I). The Buckley/Pell Statement provides the following elaboration:

. . . under certain emergency situations it may become necessary for an educational agency or institution to release personal information to protect the health or safety of the student or other students. In the case of the outbreak of an epidemic, it is unrealistic to expect an educational official to seek consent from every parent before a health warning can be issued. On the other hand, a blanket exception for "health or safety" could lead to unnecessary dissemination of personal information. Therefore, in order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will strictly limit the applicability of this exception. (Cong. Rec. S.21849 (daily ed., December 13, 1974))

It was determined that providing any list of examples would inevitably not be inclusive. In determining whether a bona-fide emergency exists, institutional officials should be award that the exception is to be construed narrowly. The criteria provided in paragraph (b) are intended as factors which would normally be used as a matter of common sense.

Sec. 99.36 Release to Other School Officials.

For the purposes of the exception set forth in 99.30(a), release of records among the component units of an educational institution (such as the various colleges which may comprise a university) will be considered to be a release to other school officials of that institution.

Sec. 99.37 Release to Federal and State Officials.

(a) Nothing in this part (shall preclude authorized representatives of) the officials listed in 99.30(c) (from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs). (20 U.S.C. 1232g(b)(3))

(b) As used in this section, the term "authorized representatives" may include contractors.

(c) Except (1) where the consent of a parent or eligible student has been obtained pursuant to 99.31-99.33 (subject to the provisions of section 440 of the General Education Provisions Act), or (2) (when collection of personally identifiable information is specifically authorized by Federal law, any data collected by) the officials listed in 99.30 (c) (shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.)

COMMENT

This section sets out the requirements of section 438(b)(3).

Section 438(b)(3) provides that institution may not deny the officials listed in 99.30(c) access to records for certain purposes, but may limit what data they may take away from such records.

It was considered whether this section should include a provision stating what limits are or are not placed on data-collection by the Office for Civil Rights (OCR). However, it has been determined that section 438 does not restrict OCR's ability to obtain personally identifiable [illegible] in connection with the enforcement of civil rights requirements.

Sec. 99.38 Record of Access.

(a) (Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all parties (other than those specified in) 99.30(a) (which have requested or obtained access to a student's education records maintained by such educational agency or institution and which will indicate specifically the legitimate interest that each such) party (has in obtaining this information.)

(b) (Such record of access shall be available only to parents) or eligible students, (to the school official and his) or her (assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of) 99.30(a) and (c) (as a means of auditing the operation of the system.) (20 U.S.C. 1232g(b)(4)(A))

COMMENT

This section sets out the requirements of section 438(b)(4)(A).

Sec. 99.39 Transfer of Information by Third Parties.

(a) Educational institutions shall not release (personal information) on a student except (on the condition that) the party to which the information is being (transferred) (will not permit any other party to have access to such information without the written consent of the parents) or of the eligible student.

(b) Educational institutions shall include, with any information released to a party under paragraph (a) of this section, a written statement which informs such party of the requirement set forth in paragraph (a) of this section. (20 U.S.C. 1232g(b)(4)(B))

COMMENT

This section sets out the requirement contained in section 438(b)(4)(B) and requires institutions to provide a written statement to those to whom data is released that they cannot subsequently release the data, in personally identifiable form, to any other party without obtaining consent of a parent or of an eligible student.

Sec. 99.40 Directory Information.

(Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.) (20 U.S.C. 1232g(a)(5)(B))

COMMENT

This section is required by section 438 (a) (5) (B).

Subpart E - Enforcement

Sec. 99.60 Office and Review Board.

The Secretary is required to establish or designate an office and review board under section 438(g) of the Act. The office will investigate, process, and review violations, and complaints which may be filed concerning alleged violations of the provisions of section 438 of the Act and regulations in this part. The review board will adjudicate cases referred to it by the office. (20 U.S.C. 1232g(g))

Sec. 99.61 Assurances Required - General.

Every application, proposal, and plan submitted to the Commissioner by an educational institution (for a grant, contract, loan, or any other type of funding under the programs referenced in 99.1(a) shall, as a condition to its approval and the extension of any Federal funding pursuant to the application, (a) contain or be accompanied by an assurance that the educational institution making such application is in compliance and will continue to comply with the provisions of section 438 of the Act and the regulations in this part, or (b) make specific reference to such an assurance previously filed with the Secretary by that institution. (20 U.S.C. 1232g(f))

COMMENT

While there is no explicit requirement for such an assurance in section 438, section 438(f) states the Secretary shall take appropriate action to enforce the provisions of section 438. Further, the statutory language "no funds shall be made available" would seem to authorize the Secretary to require some sort of assurance as a condition of funding to enable the Commissioner to know whether he is making funds available to a recipient who is in a position to comply with the requirement. Because some agencies or institutions may not be able to come into compliance immediately, because of conflicting State laws, section 99.63 makes allowances for such circumstances. This approach is authorized by 438(f), which states that termination may not occur until the Secretary has determined that compliance cannot be obtained by voluntary means.

Sec. 99.62 Assurances Required - Subgrants and Subcontracts.

Any educational institution which receives funds under a Federal program referenced in 99.1(a) shall, as a condition to making any of such funds available to another educational institution (whether by subgrant, contract, subcontract, or otherwise), require such second institution to submit to it an assurance that the other institution is in compliance and will continue to comply with the provisions of section 438 of the Act and the regulations in this part. (20 US.C. 1232g(f))

Sec. 99.63 Assurances - Conflict With State or Local Law.

(a) In the event that an educational institution, cannot provide the assurance required in 99.61 or 99.62 because a State or local law conflicts with the provisions of section 438 of the Act or the regulations in this part, the institution shall so state in each of its applications, proposals, and plans submitted to obtain Federal funds which are subject to this part, given the text and legal citation of the conflicting law.

(b) (1) The Secretary may waive the requirements in 99.61 and 99.62 for a limited period of time under the circumstances set forth in paragraph (a) of this section,

(2) The waiver will be granted only for such period as may be reasonably necessary for the pertinent State of local legislative body (and/or executive) to have an opportunity to alter the conflicting State or local law to bring it into conformity with section 438 of the Act and this part.

(c) During the period of a waiver under paragraph (b) of this section, the educational institution to which such waiver applies will not be penalized with regard to the availability of Federal funds. (20 U.S.C. 1232g(f))

Sec. 99.64 Reports and Records.

Each educational institution shall (a) make such reports, in such form and containing such information, as the Office or the Review Board may require to carry out its functions under this part, and (b) keep such records and afford such access thereto as the Office or the Review Board may find necessary to assure the correctness of such reports and compliance with the provisions of section 438 of the Act and this part. (20 U.S.C. 1232g (f), (g))

Sec. 99.65 Complaint Procedure.

(a) Complaints regarding violations of section 438 of the Act or of the regulations in this part shall be submitted to the Office in writing.

(b) A complaint must be received by the Office not later than 180 days from the date of the alleged violation unless the time for submission is extended by the Office.

(c) (1) The Office will notify each complainant and the educational institution against which the violation has been alleged, in writing, that the complaint has been received.

(2) The notification to the institution under paragraph (c) (1) of this section shall include the substance of the alleged violation and such institution shall be given an opportunity to submit a written response.

(d) (1) The Office will investigate all timely complaints received to determine whether there has been a failure to comply with the provisions of section 438 of the Act or the regulations in this part, and may permit further written or oral submissions by both parties.

(2) Following its investigation, the Office will provide written notification of its findings, and the basis for such findings, to the complainant and the institution involved.

(3) If the Office finds that there has been a failure to comply, it will include in its notification under paragraph (d) (2) of this section, the specific steps which must be taken by the educational institution to bring such institution into compliance. The notification shall also set forth a reasonable period of time, given all of the circumstances of the case, for the institution to voluntarily comply.

(e) If the educational institution does not come into compliance within the period of time set under paragraph (d) (3) of this section, the matter will be referred to the Review Board for a hearing under 99.66-99.69, inclusive.

Sec. 99.66 Termination of Funding.

If the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (1) finds that an educational institution has failed to comply with the provisions of section 438 of the Act, or of the regulations in this part, and (2) determines that compliance cannot be secured by voluntary means, he shall issue a decision, in writing, that no funds under any of the Federal programs referenced in 99.1(a) shall be made available to that educational institution (or, at the Secretary's discretion, to the unit of the educational institution affected by the failure to comply) until there is no longer any such failure to comply. (20 U.S.C. 1232g(f))

Sec. 99.67 Hearing Procedures.

(a) Panels. The Chairman of the Review Board shall designate Hearing Panels to conduct oneor more hearings under 99.66. Each such Panel shall consist of not less than three members of the Review Board. The Review Board may, at its discretion, sit for any hearing or class of hearings. The Chairman of the Review Board shall designate himself or any other member of a Panel to serve as Chairman.

(b) Procedural rules. (1) With respect to hearings involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each party to the proceeding an opportunity for presenting his case at the option of the Panel (i) in whole or in part in writing or (ii) in an informal conference before the Panel which shall afford each party: (a) Sufficient notice of the issues to be considered (where such notice has not previously been afforded); and (b) an opportunity to be represented by counsel.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall afford each party an opportunity, which shall include, in addition to provisions required by subparagraph (1) (ii) of this paragraph, provisions designed to assure to each party the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories. (20 U.S.C. 1232g(g))

COMMENT

This section and the sections which follow are drawn, with some modification, from the procedures established by the Secretary for the Grant Appeals Board, 45 CFR Part 16.

Sec. 99.68 Hearing Before Panel or a Hearing Officer.

A hearing pursuant to 99.67(b)(2) shall be conducted, as determined by the Panel Chairman, either before the Panel or a hearing officer. The hearing officer may be (a) one of the members of the Panel or (b) a nonmember who is appointed as a hearing examiner under 5 U.S.C. 3105. (20 U.S.C. 1232g(g))

Sec. 99.69 Initial decision; Final decision.

(a) The Panel shall prepare an initial written decision, which shall include findings of fact and conclusions based thereon. When a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions which shall be incorporated in the initial decision prepared by the Panel.

(b) Copies of the initial decison shall be mailed promptly by the Panel to each party (or to the party's counsel), and to the Secretary with a notice affording such party an opportunity to submit written comments thereon to the Secretary within a specified reasonable time.

(c) The initial decison of the Panel transmitted to the Secretary shall become the final decision of the Secretary, unless, within 25 days after the expiration of the time for receipt of written comments, the Secretary advises the Review Board in writing of his determination to review such decision.

(d) In any case in which the Secretary modifies or reverses the initial decision of the Panel, he shall accompany such action by written statement of the grounds for such modification or reversal, which shall promptly be filed with the Review Board.

(e) Review of any initial decision by the Secretary shall be based upon such decision, the written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties, or by their counsel, to the proceedings.

(f) No decision under this section shall become final until it is served upon the educational institution involved or its attorney. (20 U.S.C. 1232g(f))
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